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No. 92-1991

In The

Supreme Court of the United States

October Term, 1993

CHARLES S. DEAN, Sheriff of Citrus County, Florida and ROBERT A. BUTTERWORTH, The Attorney General of the State of Florida

Petitioners,

v.

JOSEPH RICHARD REDNER

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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I. A POSTJUDGMENT MOTION FOR RE-ALLOCATION OF COSTS AND RESPONSIBILITY CONCERNING CRIMINAL CONVICTIONS, IN A HABEAS CORPUS CASE, IS NOT A RULE 59(e) MOTION.

A postjudgment motion, in a habeas corpus case, to have costs and responsibility for the petitioner's conviction reallocated, is still only a motion collateral to the issues constituting the merits of the case. The notion that the post judgment motion of Co-Petitioner Butterworth, the Attorney General of Florida, was based on a "concern [that] goes far beyond the collateral issue of costs" – "the longer term issue of civil liability to [Respondent] Redner"[1] – is mistaken as a matter of law.

A. The State of Florida, directly or through the Attorney General in his official capacity; and the Attorney General in his personal capacity, are immune from civil-rights liability for damages alleged to have resulted from wrongful criminal convictions and incarceration.

Neither the attorney general,[2] as the principal constitutional officer charged with representing the interests of the State of Florida, nor the State itself, has any exposure to civil liability to Redner for damages. The State of Florida may not be sued by Respondent Redner for civil-rights liability, on account of allegedly wrongful incarceration, – either directly, or indirectly through the attorney general in his official capacity,[3] in the state or federal

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[1] See Brief in Opposition to Petition for Writ of Certiorari (Brief in Opposition), at 8-9, 10.

[2] Redner is inconsistent in his description of the attorney general's role in this lawsuit. On the one hand, Redner argues that the attorney general "is for the most part, a nominal party to this [habeas corpus] action." *Id.* at 8. On the other hand, Redner claims that the attorney general has significant concerns and interests in avoiding the claims of Redner, "not only for his wrongful incarceration, but also for the loss of business and other actual damages he suffered." *Id.* at 8-9.

[3] "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no

courts – because "a State is not a person within the meaning of § 1983." *Will v. Michigan Dep't. of State Police*, 491 U.S. at 66, 109 S.Ct. at 2308.

Additionally, for claims by Redner in the federal courts, the Eleventh Amendment[4] is a constitutional bar that disposes of any risk to the State for damages because of allegedly

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different from a suit against the State itself." *Will v. Michigan Dep't, of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 2311, 105 L.Ed.2d 45 (1989). "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id.*, 109 S.Ct. at 2312. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, ___ U.S. ___, ___, 112 S.Ct. 358, 362, 116 L.Ed.2d 301 (1991).

[4] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although not explicit in its terms, this Court has interpreted the Eleventh Amendment to establish that "an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984). Absent waiver, neither a state nor agencies under its control may "be subject to suit in federal court." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. ___, ___, 113 S.Ct. 684, 688, 121 L.Ed.2d 605 (1993). "However, the state's consent must be unequivocally expressed." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 99, 104 S.Ct. at 907.

The Eleventh Amendment bar to suit is not absolute: "States may consent to suit in federal court, . . . and, in certain cases Congress may abrogate the States' sovereign immunity." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872, 109 L.Ed.2d 264 (1990). "The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. . . . This bar remains in effect when State officials are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985).

Although 42 U.S.C. § 1983 "provides a federal forum to remedy many deprivations of civil liberties . . . it does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties." *Will v. Michigan Dep't. of State Police*, 491 U.S. at 66, 109 S.Ct. at 2309. "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the Federal-State balance in that respect." *Id.* "Section 1983 was [not] intended to disregard the well-established immunity of a state from being sued without its consent." *Id.* at 67, 109 S.Ct. at 2310.

wrongful incarceration. The Eleventh Amendment is a "withdrawal of jurisdiction [that] effectively confers an immunity from suit." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, ___ U.S. at ___, 113 S.Ct. at 687.

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, ___ U.S. ___, ___, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991).

After reviewing the scope of Article III of the Constitution, this Court has determined that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' " *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 98, 104 S.Ct. at 906, quoting *Hans v. Louisiana*, 134 U.S. at 15, 10 S.Ct. at 507.

> *"[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

Id. at 98, 99, 104 S.Ct. at 907 (emphasis in original). "This ban exists whether the relief sought is legal or equitable." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2032, 2939, 92 L.Ed.2d 209 (1986).

Furthermore, any later claim by Respondent Redner, against the Attorney General of Florida, in his personal capacity, will collide immediately with the decisions of this Court, and from the courts of appeals: for representing the interests of the State, as its chief legal officer, in litigation to uphold the constitutionality of legislation – even if it were ultimately overturned as invalid –, the Florida attorney general is immune from damages claims for civil-rights liability.[5]

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[5] The attorney general, in his personal capacity, enjoys absolute prosecutorial immunity from suit and liability for civil-rights claims based on his role as the State's chief prosecutor.

> [I]mmunity from suit under § 1983 is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), and officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue.

Hafer v. Melo, ___ U.S. at ___, 112 S.Ct. at 363.

Since a "functional" approach should be used with immunity law, *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.Ct. 496, 501, 88 L.Ed.2d 507 (1985), an official "performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Butz v. Economou*, 438 U.S. 478, 515, 98 S.Ct. 2894, 2915, 57 L.Ed.2d 895 (1978). (Department of Agriculture official absolutely immune from suit when acting as prosecutor by initiating administrative proceeding.)

> "[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. at 342, 103 S.Ct. [at] 1119. Absolute immunity flows not from rank or title or "location within the Government," *Butz v. Economou*, 438 U.S., at 511, 98 S.Ct. at 2193, but from the nature of the responsibilities of the individual official.

Cleavinger v. Saxner, 474 U.S. at 201, 106 S.Ct. at 501. "[T]hose officials who are responsible for the decision to initiate or continue a proceeding subject to . . . adjudication are entitled to absolute immunity from damages liability for their parts in that decision." *Butz v. Economou*, 438 U.S. at 516, 98 S.Ct. at 2916.

As chief law enforcement officer of the State, the attorney general possesses the powers and duties that exist under common law.

> The office of attorney general is older than the United States and is older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion; the volume and variety of legal matters involving the crown and the public interest made such limited

These bars against later, civil-rights liability to Redner, by the State of Florida, and by the Florida attorney general personally, make illusory the hypothetical "concern" of the attorney general over subsequent civil liability, as a reason for his postjudgment motion to have addressed the merits of the district court's judgment.

> independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.
>
> As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law.

State ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976), *cert. denied sub nom, Standard Oil Co. of Cal. v. Florida*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 192 (1976). The attorney general must "exercise all such power and authority as public interests may require from time to time." *State ex rel. Landis v. S.H. Kress & Co.*, 155 So. 823, 827 (1934). "The attorney general's authority runs beyond responsibility to the government *qua* government. He is responsible to the people." *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 180, 80 L.Ed.2d 562 (1984).

Fla. Stat. § 16.01(4) & (5) sets forth the attorney general's responsibilities in his role as a prosecutor for the State of Florida:

> (4) Shall appear in and attend to, in behalf of the State, all suits or prosecutions, civil or criminal or in equity, in which the State may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this State.
>
> (5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this State or in any other courts of any other state or of the United States.

The courts of appeals have consistently recognized the absolute immunity of States' attorneys general for actions taken in furtherance of their duties as chief prosecutor. *See Meade v. Grubbs*, 841 F.2d 1512, 1531 (10th Cir. 1988) (Oklahoma attorney general enjoys absolute immunity regarding decisions to prosecute); *Fullman v. Graddick*, 739 F.2d 553, 558-59 (11th Cir. 1984) (Alabama attorney general absolutely immune for activities taken within role as prosecutor); *Ledwith v. Douglas*, 568 F.2d 117, 119 (8th Cir. 1978) (claims against Nebraska attorney general barred by doctrine of prosecutorial immunity); *Prince v. Wallace*, 568 F.2d 1176, 1178-79 (5th Cir. 1978) (Alabama attorney general absolutely immune for actions taken within scope of duties as prosecutor).

B. A postjudgment motion requesting a redetermination of costs, remains collateral to the merits of the lawsuit.

Redner acknowledges that the assessment of costs does not involve reconsideration of any aspect of the decision on the merits;[6] but he appears to think that when costs – although collateral, if raised after judgment – are included as a part of the judgment originally, a postjudgment motion that seeks "to amend that assessment" is a Rule 59(e) motion.[7]

Efforts to rationalize the court of appeals' inconsistency below, with its own earlier decisions, in *Alimenta v. Anheuser-Busch Co.*, 830 F.2d 1160 (11th Cir. 1986), and *Lucas v. Florida Power & Light Co., supra,* – not to mention

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[6] Brief in Opposition, at 12.

[7] "But in this case, costs had already been assessed, and the [postjudgment] motion was to amend that assessment." *Id.* On the other hand, Redner is quick to admit: "Attorney's fees are clearly a collateral issue, totally unrelated to the merits or fundamental findings of a final judgment. Had the Motion before the district court been related to attorney's fees, Redner would concede that the original Notice of Appeal was timely and valid." *Id.*, at 10.

In light of this concession, the force of the Eleventh Circuit Court of Appeals' decision in *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984), is inescapable:

> The narrow issue in *White [v. New Hampshire Dep't. of Employment Security*, 455 U.S. 455, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982)] was whether a motion for attorney's fees following judgment, under 42 U.S.C. § 1988, constituted a Rule 59 motion to alter or amend the judgment. The Supreme Court held that it did not:
>
> > The federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits [citation omitted]. By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action – *issues to which Rule 59(e) was never intended to apply.*
>
> *Id.*, 102 S.Ct. at 1166 (emphasis supplied). the Supreme Court's observations with respect to attorney's fees applies with equal if not greater force to costs, for costs must certainly be regarded as collateral to the main cause of action in this case.

Id. at 1301 n.1. Additionally, "[a]t common law, attorneys fees were regarded as an element of 'costs' awarded to the prevailing party." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 1721, 100 L.Ed.2d 178 (1988).

this Court's decisions in *Buchanan v. Stanships, Inc.*, and *Budinich v. Becton Dickinson & Co.* – on a supposed "distinction between original applications for costs and applications to amend cost awards,"[8] are simply wrong.

First, both *Alimenta v. Anheuser-Busch Co.*, and *Lucas v. Florida Power & Light Co.*, were cases in which a party moved for a reassessment of costs that were explicitly set forth in the initial, original judgment,[9] – a situation identical to the case at hand.

Second, any judgment issued by a court necessarily allows the prevailing party to recover costs, regardless of whether costs are specifically mentioned or allocated in the judgment, "unless the court otherwise directs." Fed. R. Civ. P. 54(d).[10] Consequently, any postjudgment motion regarding costs will necessarily be a request "to amend a cost award," because costs are automatically authorized by every original judgment, unless explicitly directed otherwise by the court. Implicit in every judgment that does not expressly forbid it is the right of the prevailing party to an award of properly

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[8] Brief in Opposition, at 13. "The cases cited by Petitioner . . . generally go to the consideration of an *original* order on the issue of costs, [but i]n the instant case, the final judgment, prior to its amendment, disposed of the issue of costs. "*Id.* at 10 (emphasis in original).

[9] In *Alimenta*, the final judgment had required each party to bear its own costs, and the defendant requested a reconsideration of this decision. 830 F.2d at 1162. In *Lucas*, the original judgment stated that the defendant shall recover costs from the plaintiffs, and the plaintiffs moved to alter or amend the judgment with respect to the allocation of costs. 729 F.2d at 1300.

Contrary to Redner's view, other cases relied on in the Petition for Writ of Certiorari also involved a reassessment of costs that had been set forth explicitly in the original judgment (as in the case at hand). *See Fincher v. Keller Ind., Inc.*, 905 F.2d 691 (3d Cir. 1990) (district court rendered judgment in favor of defendant, but specifically denied costs); *Durham v. Kelly*, 810 F.2d 1500 (9th Cir. 1987) (district court judgment provided for each party to bear own costs).

[10] Fed. R. Civ. P. 54(d) provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

taxable costs, by virtue of Rule 54(d). "Under Rule 54(d), the 'prevailing party' automatically is entitled to costs 'unless the court otherwise directs.' " *Buchanan v. Stanships, Inc.*, 485 U.S. at 268, 108 S.Ct. at 1131-32, quoting 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2679.

In reality and practice, all postjudgment motions concerning costs – even where an original judgment is silent, or expressly denies costs – are ones that are collateral to the merits of the judgment, because they are directed toward amending the cost award, or denial of an award. The attempt to distinguish between "original applications for costs" and "applications to amend cost awards" is ineffectual.

Third, the fact that the attorney general's postjudgment motion requested a reassessment of costs, does not alone supply the distinguishing standard for whether a postjudgment motion is collateral or one under Rule 59(e). The assessment of costs in a judgment may be changed – reassessed – without necessarily revisiting the ruling on the merits of the case as embodied in the judgment.

A "postjudgment motion for costs similarly [seeks] only what is due *because* of the judgment." *Id.* at 268, 108 S.Ct. at 1131 (emphasis in original).

> [T]he opinion in *Budinich [v. Becton Dickinson & Co., supra]*, makes it plain that a motion to allocate costs is not deemed a rule 59 motion, irrespective of whether the merits award incorporates an automatic award of costs. . . .
>
> [I]n *Budinich* the Court made it patent that a motion for costs or attorneys' fees is not to be deemed a rule 59 motion, even where the cost or fee award might be viewed as an integral part of the merits.

Samaad v. City of Dallas, 922 F.2d 216, 218 (5th Cir. 1991).

Finally Redner confuses the point of the Third Circuit's decision in *Fincher v. Keller Ind., Inc., supra,* from which he quotes.[11] What the court of appeals recognized in *Fincher,* was "that in some cases there may be sufficient ambiguity in the motion itself to lead a court of appeals to hold that the motion acted as a Rule 59(e) motion." *Id.* at 694. This is not the situation in the case at hand; and in fact Redner urges just the opposite, that the attorney general's postjudgment motion bore "no ambiguity on [its] face": "[i]t was styled as a Motion for Relief from Judgment, Motion to Amend Judgment, and it invoked Rule 59(e)."[12]

Additionally, Redner's argument ignores the import of this Court's decisions, and those from the courts of appeals, that merely calling a postjudgment motion a Rule 59(e) motion and invoking Rule 59 does not automatically and necessarily make it a Rule 59(e) motion.

> [A] motion for costs filed pursuant to Rule 54(d) does not "seek to alter or amend the judgment" within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply. . . . Respondents' inaccurate designation of their costs request as a Rule 59(e) motion cannot change this fact.

Buchanan v. Stanships, Inc., 485 U.S. at 268-69, 108 S.Ct. at 1132. *See Durham v. Kelly,* 810 F.2d at 1503 ("appellants label[ing] their motion as a Rule 59(e) motion is not dispositive."); *Lucas v. Florida Power & Light Co.*, 729 F.2d at 1302 (notwithstanding that plaintiffs characterized motion as one under Rule 59, "nomenclature is not controlling").

Redner's postjudgment motion requesting a reassessment of costs remains collateral to the merits. Any attempt to

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[11] In *Fincher,* the court stated that the appealability of a judgment in the face of a postjudgment motion, is a matter to be determined by the "party seeking to appeal" – which requires a determination as well about the nature of the postjudgment motion. 905 F.2d at 693.

[12] Brief in Opposition, at 14.

distinguish between postjudgment motions for original applications for costs, and one to amend cost awards, is quelled by Rule 54(d) and by the fact that costs may be redetermined without revisiting the merits of a judgment.

CONCLUSION

A concern by the Florida attorney general – imagined by Redner – about risk of civil-rights liability for damages from the State itself, or from him personally, is fictional. For § 1983 claims in state or federal courts, the State is not a person, either directly, or indirectly through the attorney general in his official capacity; and the Eleventh Amendment is an additional bar against liability for civil damages in the federal courts. In his personal capacity, the attorney general is absolutely immune from suit and liability.

The attorney general's postjudgment motion, requesting a redetermination of costs assessed by the court in the original judgment, remains collateral to the merits of the case, and is not a Rule 59(e) motion, regardless of whether characterized as an "original application for costs" or an "application to amend cost awards."

A writ of certiorari should be issued to the United States Court of Appeals for the Eleventh Circuit, reversing its June 17, 1992 order dismissing the appeal from the district court's May 18, 1991 judgment.

Respectfully submitted,

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